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February 1, 2013

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Notice of *Ex Parte* – CC Docket No. 96-45; CC Docket No. 01-92; WC Docket No. 03-109; WC Docket No. 05-337; WC Docket No. 07-135; WC Docket No. 10-90; GN Docket No. 09-51

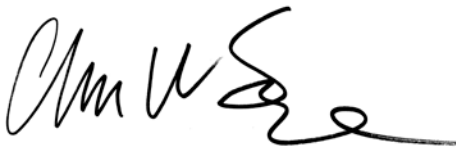
Dear Ms. Dortch:

On January 30, 2013, undersigned counsel, accompanied by Mr. Cody Harrison (corporate counsel for Bright House Networks) met with the following FCC personnel: Randy Clarke, Robin Cohn, Lynne Engledow, John Hunter and Rhonda Lien of the Pricing Policy Division of the Wireline Competition Bureau; and Alec McDonell of the Industry Analysis and Technology Division of the Bureau. The purpose of the meeting was to discuss the January 17, 2013, *ex parte* filing in the above-noted dockets made by David L. Lawson of Sidley Austin LLP. During the meeting we discussed the points included in the attached slide deck.

Please contact undersigned counsel if you have any questions about this matter.

Sincerely,

Davis Wright Tremaine LLP



Christopher W. Savage

cc: WCB personnel noted above

CLEC LOCAL SWITCHING CHARGES AND THE COMMISSION'S "SYMMETRY" RULE

January 30, 2013

WHO IS BRIGHT HOUSE NETWORKS?

- Bright House Networks, LLC (BHN)
  - BHN is a privately-held enterprise, and the sixth largest cable MSO in the U.S. with service areas in FL, AL, CA, IN and MI.
  - BHN has 2.5 million subscribers of video, high-speed data and voice services. BHN also offers a full suite of commercial services to businesses of all sizes.
  - BHN has more than 1,000,000 voice customers.
  - BHN is consistently ranked among the highest in customer satisfaction for its cable modem and voice service by J.D. Power & Associates. BHN's residential voice service has received widespread consumer acceptance.
  - BHN's CLEC affiliate supports voice service operations by providing interconnection and PSTN services.

WHY DOES BHN CARE ABOUT THIS ISSUE?

- BHN's CLEC affiliate has faced disputes with several IXCs, totaling more than $10 million, regarding access charges in general and switching in particular.
  - E.g., BHN's CLEC had to sue, and threaten to sue, IXCs in the face of claims that access charges were not due, supposedly because the customer of BHN's CLEC was its affiliated VoIP entity
- Under a broad reading of AT&T's arguments, or an unreasonably narrow construction of the "functional equivalence" test, AT&T could claim that millions of dollars of past access payments (including payments already made to BHN's CLEC) should be refunded.

WHAT'S WRONG WITH AT&T'S CLAIMS?

- AT&T's claims are unrelated to the rationale for the symmetry rule – no double billing.
- AT&T's already-flawed analysis falls apart when the focus moves beyond single-line end users. The arrangements used to switch calls to PBXs, private networks, etc. – and the way ILEC access charges apply and have applied in those situations – show that AT&T is wrong.
- AT&T's arguments focus on specific technical means that CLECs might (or might not) ***use*** to provide an IXC with local switching functionality – not on the nature of the functionality that the IXC actually ***receives***.
- AT&T treats the "public Internet" as some sort of free, publicly-provided utility, not as a private network (separate from the PSTN) that provides a wide range of communications functions.
- ILEC Part 32 accounting issues (RAO 21) are a distraction, largely irrelevant to the functional equivalence test.

REMEMBER THE RATIONALE

- The Commission made clear that the problem it has been worried about is “double billing” – more than one carrier filing tariffs that would allow them the charge an IXC twice for the same traffic.
- AT&T’s major ex parte filing from January 17, 2013 does not even mention double billing.
- There is no prospect that an IXC would be double-billed in the network configuration at issue with Level 3 and bandwidth.com (much less standard cable-CLEC configurations).
- Untethered from the policy rationale for the symmetry rule, AT&T’s claims are inherently suspect.

WHAT DOES THE IXC *GET*?

- AT&T focuses on specific technical means that a CLEC might ***use*** to provide the functional equivalent of local switching, rather than on the fact that IXCs ***receive*** that functionality.
  - This turns the "functional equivalence" test inside out by focusing on ***how ILECs did things for IXCs***, rather than on ***what an IXC is paying to get done***.
- In the actual economics and engineering of networks, there are always trade-offs among different amounts of switching, and between switching and transmission. ***Very different facilities configurations can be used to do identical "work" – that is, to provide the equivalent functionality – from an IXC's point of view.***
  - For this reason, the function-by-function parsing of what old-style ILEC end offices do, or used to do, is unnecessary and beside the point.
  - The proper focus is on whether AT&T is getting the service it needs –delivery of calls to the services associated with particular phone numbers – not on the specifics of how the CLEC does it.
- Switching is not loop transmission; AT&T's focus on loop alternatives is misguided.

LOOPS INCLUDE INTERSWITCH TRUNKS, NOT JUST SINGLE LINES

- AT&T focuses on single-line end users rather than on PBX trunking used by business customers.
  - At the time access charges were instituted, and subsequently, most end office switching (counted by minutes or money) has not involved calls to single line end users.
    - Large PBXs/Private Line Networks
    - Shared Tenant Service arrangements
    - Type 1 Wireless interconnection
  - The regulatory question has been, “Who is the customer?” not, “What does the customer do?”
    - “Who is the customer?” is answered by economic relationships – tariffs, contracts, etc., and the existence of demarcation points.
    - On the customer side of the demarcation point, the customer can do whatever it wants – including very elaborate onward switching and transmission.

THE INTERNET IS A PRIVATE LINE NETWORK

- AT&T's filing treats "the public Internet" as free, publicly-provided utility, which it is not:
  - The "public Internet" is not a utility. The provision of Internet transport and routing has never been treated as a common carrier function. The networks that make up the Internet are privately owned and managed. Internet services are not available via tariff, and are not regulated. Yet AT&T talks about it like it is a freely-available, publicly provided utility, or a road.
  - The only way Level 3 (or anyone else) can "dump" calls onto "the public Internet" is if they have paid for the right to access "the public Internet" – which is really a collection of (in regulatory terms) ***private*** networks.
    - In economic terms, using the Internet to deliver traffic is like using any other private infrastructure – such as conduits or poles, or communications lines.
  - In regulatory terms, the Internet is most akin to a private line network. Delivering traffic to the Internet is like delivering traffic to a PBX connected to a private network.

PART 32 IS IRRELEVANT

- AT&T focuses on ILEC Part 32 accounting questions (RAO 21) which are irrelevant to the functional equivalence test.
  - RAO 21 resolved ambiguities in Part 32 classification of remote switches versus loop concentrators and found that remote switches belonged in the switching account (Account 2212).
  - The question under RAO 21 was ***how 1990s-vintage ILEC end office switches worked*** and ***whether remote switches were similar to those 1990s-vintage ILEC end office switches for accounting purposes***. That is a totally different question from what the post-1996-Act "functional equivalent" of end office switching might be.
    - The features that distinguish an end office switch from a line concentrator are not particularly relevant to the defining characteristics of the "switching function" from the point of view of an IXC with traffic to deliver.

WHAT SHOULD WCB DO?

- Confirm that the key policy behind the symmetry rule is ***functional equivalence,*** not matching historical ILEC gear or network configurations element-by-element.
- Confirm that the key functionality of local switching is getting calls from IXCs to ***customers*** (not "end users" or "individual subscriber lines") based on the dialed telephone number, and that this function includes switching to ***trunk groups*** – including trunk groups that connect to PBXs that are part of private networks – as well as to individual lines.
- Confirm that the regulatory treatment of services a LEC provides to an IXC is not affected by what the LEC's customer does with the traffic, once the LEC has delivered it.
- Confirm that "the public Internet" is, in regulatory terms, a ***private, unregulated network***, access to which is subject to private contractual payments.
    - For purposes of the application of terminating access charges, delivery of calls by a LEC to "the Internet" should be treated just like the delivery of calls by a LEC to any other private line network.